No. 14-510

IN THE

Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

PAUL D. CLEMENT
BANCROFT PLLC
500 New Jersey Ave., N.W.
Seventh Floor
Washington, D.C. 20001
(202) 234-0090

GEOFFREY D. STROMMER
Counsel of Record
JERRY C. STRAUS
STEPHEN D. OSBORNE
CAROLINE P. MAYHEW
ADAM P. BAILEY
HOBBS, STRAUS, DEAN & WALKER, LLP
806 SW Broadway
Suite 900
Portland, OR 97205
(503) 242-1745
gstrommer@hobbsstraus.com

Counsel for Petitioner

September 2, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the D.C. Circuit misapplied this Court's *Holland* decision when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 24.1(b), the following list represents all the parties appearing here and before the United States Court of Appeals for the District of Columbia Circuit.

Petitioner is the Menominee Indian Tribe of Wisconsin, a federally recognized Indian tribe. Respondents are the United States of America, the Secretary of Health and Human Services, and the Director of the Indian Health Service.

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OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit opinion is reported at 764 F.3d 51 ("*Menominee IV*") (Pet. App. 1a-19a). The opinion of the District Court is reported at 841 F. Supp. 2d 99 (D.D.C. 2012) ("*Menominee III*") (Pet. App. 20a-43a). An earlier decision in this dispute by the D.C. Circuit is reported at 614 F.3d 519 (D.C. Cir. 2010) ("*Menominee II*") (Pet. App. 44a-68a), rev'g & remanding *Menominee Indian Tribe of Wis. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008) ("*Menominee I*") (Pet. App. 69a-74a).

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. This Court granted a timely petition for certiorari on June 30, 2015 and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Self-Determination and Education Assistance Act, 25 U.S.C § 450m-1(d), provides as follows: "The Contract Disputes Act . . . shall apply to self-determination contracts . . . ."

The Contract Disputes Act, 41 U.S.C. § 7103(a)(4)(A),[1] provides as follows: "Each claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim."

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[1] During the years at issue in this appeal, this provision was codified at 41 U.S.C. § 605(a). The Contract Disputes Act has since been revised and renumbered, but the six-year statute of limitations is substantially unchanged. In this brief the Tribe will follow the decision of the D.C. Circuit in *Menominee IV* in citing to the current codification. Pet. App. 3a n.1.

INTRODUCTION

This case involves a breach of contract claim under the Indian Self-Determination and Education Assistance Act ("ISDA" or "Act"), 25 U.S.C. § 450 *et seq.*, resulting from the Federal Government's failure to fully pay tribal contract support costs required by that Act. See *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005) ("*Cherokee*"). The question now presented is whether the D.C. Circuit erred in holding that the standard was not met for equitable tolling of the six-year statute of limitations under the Contract Disputes Act ("CDA") as incorporated by the ISDA, thus precluding recovery of unpaid contract support costs for certain contract years by the Menominee Indian Tribe of Wisconsin.[2] 25 U.S.C. § 450m-1(d); 41 U.S.C. § 7103(a)(4)(A).

Menominee, an Indian tribe located in northern Wisconsin, has very limited resources and relies mainly on federal funding to provide basic health care services to its members. Pet. App. 99a; J.A. 41-116. The Tribe's formal relationship with the United States dates back to the early 1800's when, through a series of treaties, the Tribe established "peace and friendship" with the United States and ceded the vast majority of its lands to the United States in exchange for its protection and services. *Menominee Indian Tribe of Wis. v. United States*, 39 Fed. Cl. 441, 448 & n.6 (1997). Pursuant to those treaties and to related Acts of Congress, the Federal Government largely managed the Tribe's affairs and provided basic social services to tribal members until 1961, when the Menominee Termination Act of 1954, enacted over the Tribe's

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[2] Petitioner is referred to as "Menominee" or "Tribe" throughout this brief.

strenuous objections, became fully effective. *Id.* at 451-52.

The Termination Act sought to end the responsibilities of the United States to the Tribe, cut off federal services to tribal members, and subjected the Tribe and its lands to State and local laws and taxation. *Id.* at 452. Very few preparations were made to enable the Tribe and its members to cope with these sudden and radical changes. *Id.* The tragic result was economic and social disaster for the Tribe,[3] leading Congress in 1973 to enact the Menominee Restoration Act to restore the Tribe's federal status and its eligibility to receive federal funds for health care and other federal benefits for its members. Pub. L. No. 93-197, 87 Stat. 770 (1973). The painful legacy of termination continues to impact the Tribe and its members today; however, despite the Tribe's lack of wealth it is able to provide health care services to its members through contracts and annual funding agreements with the Indian Health Service ("IHS") pursuant to the ISDA. J.A. 41-116.

The ISDA, designed to allow tribes like Menominee to exercise greater control over the governmental services provided to their members, requires payment of contract support costs associated with each contract in order to cover necessary administrative and overhead expenses not otherwise included in the contract amount. 25 U.S.C. § 450j-1(a)(2). The contract support requirement ensures that tribes (many of which, Congress recognized, lack sufficient sources of independent income) are not forced to subsidize federal responsibilities as

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[3] For a summary of the history and impacts of termination on the Menominee Tribe, see *Menominee Indian Tribe*, 39 Fed. Cl. at 450-57.

a result of exercising their self-determination rights under the Act. S. REP. NO. 100-274, at 12-13 (1988).

The liability of the Government to pay the full amount of contract support costs owed under the ISDA and its contracts has been the subject of litigation for decades. See *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) ("*Salazar v. Ramah*"); *Cherokee*, 543 U.S. 631. Following this Court's decision in *Cherokee* affirming the Government's liability for certain types of contract support cost shortfalls, several tribes and tribal organizations, including Menominee, filed individual claims (which had at various points in time been the subject of national class action lawsuits) with the IHS under the CDA. Many of those claims, including Menominee's 1996 through 1998 claims, were rejected by the IHS, despite *Cherokee*, on timeliness grounds.

In *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) ("*ASNA II*"), Pet. App. 75a, the Federal Circuit held that the CDA statute of limitations, as incorporated by the ISDA, was equitably tolled for the purposes of materially identical contract support cost claims filed by another ISDA tribal contractor that, like Menominee's claims, had been deemed untimely by the IHS.[4] Under this Court's decision in *Holland v. Florida*,

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[4] ASNA is an inter-tribal consortium of seven federally recognized tribes in the North Slope region of Alaska. ASNA is considered a "tribal organization" under the ISDA and is treated as a tribe for purposes of entering into ISDA contracts and compacts with the IHS. 25 U.S.C. § 450b(*l*); 25 U.S.C. § 450f; 25 U.S.C. §§ 458aaa(a)(5), (b).

> . . . a "petitioner" is "entitled to equitable tolling" only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing.

560 U.S. 631, 649 (2010) ("*Holland*"), quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).[5] On the "unique circumstances of the case," the Federal Circuit found cumulative import in the combination of several factors that affected timely filing of the claims, including: ASNA's reasonable belief that its claims would be included in a national class action pending against the IHS; a prior successful contract support class action certification and later adverse legal developments; and ASNA's diligence in monitoring and reacting to the shifting legal landscape, first as a putative class member and later as an individual claimant. The Federal Circuit found that ASNA acted with reasonable diligence under extraordinary circumstances; that tolling resulted in no prejudice to the Government, which was aware of ASNA's claims as a result of the prior national class action filings; and that the unique

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[5] Though both *Holland* and *Pace* involved criminal defendants seeking to toll the statute of limitations for filing a habeas corpus petition, the Court recently recognized that the two-part *Holland* test for equitable tolling is also appropriate in the context of civil claims against the federal government. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630-31 (2015) (quoting *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231–1232 (2014)). Lower courts have also applied *Holland* in a variety of civil contexts. See, *e.g.*, *Wohlwend v. Shinseki*, 549 Fed. Appx. 1015 (Fed. Cir. 2013) (appeal from Court of Appeals for Veterans Claims under 38 U.S.C. § 7266); *Bergman v. Kindred Healthcare, Inc.*, 949 F. Supp. 2d 852, 860 (N.D. Ill. 2013) (tolling under Fair Labor Standards Act); *Flores v. Predco Servs. Corp.*, 911 F. Supp. 2d 285, 288-89 (D.N.J. 2012) (tolling in personal injury action against private defendant).

federal-tribal relationship weighed in favor of equitable tolling considering the federal obligations to tribes flowing from that relationship. *ASNA II*, 699 F.3d at 1295-98.

Though all of the same considerations apply fully in Menominee's case, Menominee did not benefit from the Federal Circuit's decision because it had appealed the denial of its claims to the D.C. Circuit,[6] which held that equitable tolling was not warranted. Pet. App. 1a-19a (*"Menominee IV"*). The *Menominee IV* and *ASNA II* courts acknowledged the materially similar facts of the two cases, but they disagreed on the application of the equitable tolling standard.[7] The D.C. Circuit rejected the Federal Circuit's comprehensive and unified analysis of the facts and circumstances and denied tolling on the grounds that Menominee failed to identify a specific "external obstacle" that prevented it from timely filing. Pet. App. 18a. As a result, Menominee has been precluded from full recovery under this Court's decision in *Cherokee* of contract support costs to support the operation of its health care programs under the ISDA.

Holland requires courts to undertake an equitable analysis on a "case-by-case basis," rather than according to "mechanical rules," and to determine whether tolling is necessary to relieve hardship that would otherwise be imposed by "hard and fast adherence" to absolute legal rules. *Holland*, 560 U.S. at 649-650. While the

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[6] Under the ISDA, tribal contractors have the option to appeal a contracting officer's decision to the Interior Board of Contract Appeals (now the Civilian Board of Contract Appeals); to bring a *de novo* action in the U.S. Court of Federal Claims (as permitted by the CDA, 41 U.S.C. § 7104(b)); or to bring a *de novo* action in federal district court. 25 U.S.C. § 450m-1(a).

[7] Pet. App. 14a n.5; Pet. App. 87a n.4.

Federal Circuit applied the holistic equitable analysis required by *Holland*, the D.C. Circuit applied a rigid and "mechanical" test—an approach this Court rejected in *Holland* as inconsistent with the exercise of equitable jurisdiction—by imposing a novel "external obstacle" requirement. Because the facts of this case establish extraordinary circumstances justifying equitable tolling, and because the Tribe pursued its rights diligently, the judgment below should be reversed.

STATEMENT OF THE CASE

I. The ISDA and Contract Support Costs

The ISDA was enacted in 1975 to redress "the prolonged Federal domination of Indian service programs" by allowing tribes to exercise increased control over those programs. 25 U.S.C. § 450(a)(1). In enacting the ISDA, Congress declared its commitment

> . . . to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes . . . [and] . . . to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450a(b). The ISDA authorizes tribes to enter into agreements with the Secretary of Health and Human Services ("the Secretary") to assume responsibility to provide contractable programs, functions, services and activities provided for the benefit of tribal members and other beneficiaries that the Secretary would otherwise have administered directly. The mechanism for

doing so relevant to this action is the self-determination contract under Title I of the ISDA. See 25 U.S.C. § 450f.

Section 106(a) of the ISDA requires that, in any ISDA agreement like the Tribe's, the Secretary provide two types of funding: (1) "program" funds, the amount the Secretary would have provided for the contracted programs, functions, services and activities had the IHS retained responsibility for them, 25 U.S.C. § 450j-1(a)(1); and (2) contract support costs, which cover reasonable administrative and overhead costs associated with carrying out the contracted programs, 25 U.S.C. §§ 450j-1(a)(2), (3), & (5).

Congress added the requirement to provide contract support costs (also termed indirect costs) to the ISDA in 1988, in recognition of the fact that many tribes lack the financial means to absorb such administrative and overhead costs, and to ensure that tribes would not be forced to use their limited resources to subsidize federal responsibilities as a condition of participation under the ISDA.[8] The Senate Select Committee on Indian Affairs observed that "[f]ull funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed[,]" but that the agencies had systematically failed to provide full funding for

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[8] The committee report noted that:

> Tribes and tribal organizations with no independent income are faced with the onerous choice of either reducing the level of services to pay for administrative costs, or else reducing their level of effort to maintain their administrative systems. The Committee is greatly concerned that tribes will choose a third alternative: to retrocede the contract back to the Federal agency.

S. REP. NO. 100-274, at 13 (1988).

such costs. S. REP. NO. 100-274, at 13 (1988).[9] In light of that and other failures of the contracting agencies to faithfully implement the ISDA, Congress also provided strong remedial provisions, including the right of tribal contractors to seek money damages for unpaid contract funds under the CDA and to challenge a contracting officer's decision in either the Court of Federal Claims or federal district court. 25 U.S.C. §§ 450m-1(a), (d); 41 U.S.C. § 7104. The committee report noted:

> The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law

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[9] The committee report emphasized this failure:

> Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. [. .] It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.

Id., at 8-9.

> affords such contractors no effective remedy for redressing such violations.

S. REP. NO. 100-274, at 37 (1988).[10]

Congress's foresight in providing these tribal remedies has proven prescient. While Section 106 of the ISDA, as amended, required full payment of contract support costs from available appropriations, the IHS continued to insist that it was permitted to pay tribal contractors less than the full amount of indirect costs owed under the ISDA and their contracts. It did so based in part on the agency's interpretation of section 106(b), which makes contract funding "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). From 1994 through 1997, the IHS maintained that the Secretary had the discretion to limit "available" funds to the amounts recommended in committee reports on the appropriations bills.[11] Therefore, the IHS severely underpaid the vast majority of tribal contractors, including the Menominee Tribe, a fact documented in the agency's annual contract support cost "shortfall reports." See 25 U.S.C. § 450j-1(c) (mandating annual report to Congress on contract support distribution and deficiencies).

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[10] In 1988, when the CDA was incorporated into the ISDA, there was no statute of limitations for filing administrative claims. The six-year limitation was added later, in 1994. See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a)(1), 108 Stat. 3322 (codified as amended at 41 U.S.C. § 7103(a)(4)(A)).

[11] See, *e.g.*, *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1087–88 (Fed. Cir. 2003) (summarizing and rejecting the Secretary's interpretation); *Cherokee*, 543 U.S. at 644 (same), aff'g *Thompson v. Cherokee Nation of Okla.*

II. The Contract Support Cost Litigation History

In 1990, the Ramah Navajo Chapter filed a class action suit in the U.S. District Court for the District of New Mexico against the Secretary of the Interior alleging that the Bureau of Indian Affairs ("BIA") systematically underpaid indirect costs under its ISDA contracts. *Ramah Navajo Chapter v. Lujan*, No. 1:90-cv-0957 (D.N.M. filed Oct. 4, 1990) ("*Ramah*").[12] Initially, the suit focused solely on claims that the BIA utilized a flawed indirect cost rate calculation methodology that resulted in underpayment. *Id.* The case later came to include "shortfall claims" of the kind Menominee raises in this case, alleging that the Secretary did not pay 100% of indirect costs even as calculated with the diluted rates. See *Salazar v. Ramah*, 132 S. Ct. at 2187-88.

In 1993, Ramah successfully moved for certification of a nationwide class of all tribal contractors who had contracted with BIA under the ISDA. J.A. 35-40. The Government argued that the class could not be certified unless each class member had first exhausted its administrative remedies by filing individual claims with the agency contracting officer as required by the CDA. J.A. 37. The court held, however, that "it is not necessary that each member of the proposed class exhaust its administrative remedies," and that all tribal contractors could participate in and benefit from the class action even if they had not presented separate claims to the agency. J.A. 39. The court reasoned that

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[12] Ramah is a political subdivision of the Navajo Nation and contracts as a "tribal organization" on behalf of the Navajo Nation under the ISDA. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1456 (10th Cir. 1997) ("*Ramah II*"). See *supra* note 4.

exhaustion is not required if it "would be futile or would fail to provide adequate relief, or where an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law." J.A. 38, citing *Association for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993). The court noted:

> Plaintiff's action does not concern a typical contract dispute wherein issues of performance need be addressed. If that were the case, the purposes behind exhaustion of administrative remedies would require that the contract claim first be brought to the attention of an agency contracting officer. Instead, Plaintiff's action challenges the policies and practices adopted by the BIA as being contrary to the law and seeks to make systemwide reforms. In such a case as this, exhaustion of administrative remedies is not required.

J.A. 38-39.

In 1997, the Tenth Circuit ruled in favor of Ramah with respect to the indirect cost rate calculation methodology. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) ("*Ramah II*"). As a member of the *Ramah* class, Menominee thereafter received substantial payments as a result of two partial settlements, without ever submitting individual claims to the BIA. Pet. App. 99a. These class action settlements were approved by the district court. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1109 & 1111 (D.N.M. 1999); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1317-1319 (D.N.M. 2002). The Government has never sought to decertify the *Ramah* class; in fact, the *Ramah* class action is still pending and settlement negotiations are underway for remaining shortfall claims. See *Ramah*, Docket entry No. 1290 (D.N.M.

Dec. 16, 2014) (Clerk's minutes noting settlement conference).

The Cherokee Nation filed a separate class action on March 5, 1999, this time against the IHS. *Cherokee Nation of Okla. v. United States*, No. 6:99-cv-0092 (E.D. Okla.) ("*Cherokee Nation*"). Both the class and the claims were nearly identical to those in the *Ramah* case except for the defendant agency. The Cherokee Nation, like the Ramah Navajo Chapter before it, challenged a uniform agency policy—deliberate underfunding of contract support costs for virtually all tribal contractors. The proposed class was defined as "all Indian tribes and tribal organizations operating Indian Health Service programs under contracts, compacts, or annual funding agreements authorized by the [ISDA] that were not fully paid their contract support cost needs, as determined by IHS, at any time between 1988 and the present." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001).

The day the *Cherokee Nation* class action was filed, class counsel sent a letter to all tribes (including Menominee) announcing that they may have a claim covered by the class action if they contracted with IHS under the ISDA during the claims period. J.A. 28-30. As a longtime contractor with the IHS, Menominee fit squarely within the putative class. In a General Bulletin accompanying the letter, class counsel assured tribes that "[f]iling the case as a class action has the effect of stopping the running of any statute of limitations against individual tribes eligible for membership in the class." J.A. 34.

Based on these representations from class counsel, as well as Menominee's own experience in the *Ramah* class, the Tribe reasonably believed it need not file its own claims with the agency in order to participate in

the class action, and that the statute of limitations on such claims was tolled at least until such time as class certification might be denied. Pet. App. 99a-100a. Menominee's decision not to separately file and litigate its individual claims at that point in time served not only to conserve the Tribe's own scarce resources, but was consonant with the goals of judicial economy underlying class actions under Federal Rule of Civil Procedure 23. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-53 (1983) (Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims); *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974) (efficiency and economy of litigation is a principal purpose of class action procedure under Rule 23).[13]

On February 9, 2001, the Cherokee Nation's motion for class certification was denied. *Cherokee Nation*, 199 F.R.D. at 366. The court found, contrary to the Government's argument, that the proposed class members could be sufficiently identified with reference to the IHS's own shortfall reports, but that the plaintiff had failed to establish other requirements of Rule 23. *Id.* at 363-66 & 366 n.1. Thus, the court did not rule on presentment of claims, as the *Ramah* court had, but indicated that any Tribe listed on the IHS shortfall reports as having experienced a shortfall would have been included in the class, had Rule 23 otherwise been satisfied. On June 25, 2001, the *Cherokee Nation* court ruled on the merits and found that the IHS had no statutory duty to fully fund contract support costs under the ISDA. *Cherokee Nation of Okla. v. United*

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[13] As further discussed at p. 43, *infra*, filing separate claims at the administrative level would most likely have committed Menominee to litigating those claims in federal court in order to preserve them for appeal. 41 U.S.C. § 7104; 25 U.S.C. § 450m-1(a).

States, 190 F. Supp. 2d 1248 (E.D. Okla. 2001). The Cherokee Nation appealed the substantive ruling to the Tenth Circuit, but did not appeal the denial of class certification, making that ruling final.

After the *Cherokee Nation* court denied class certification in 2001, a second class action was filed by the Pueblo of Zuni against the IHS. *Pueblo of Zuni v. United States*, No. 1:01-cv-01046 (D.N.M. filed Sept. 10, 2001) ("*Zuni*"). The proposed class was defined as "all tribes and tribal organizations contracting with IHS under the ISDA between fiscal years 1993 to the present." Complaint, *Zuni*, No. 1:01-cv-01046 Docket entry No. 1 (D.N.M. Sept. 10, 2001), at ¶ 53. *Zuni* was stayed pending the outcome of the *Cherokee Nation* litigation.

When Menominee learned that the Cherokee Nation's motion for class certification had been denied and that the denial had not been appealed, it considered its options. The Tribe attended national tribal meetings on contract support and learned that "the case law was not clear on whether tribal contract support cost claims were valid" and that "most courts had ruled against such claims." Pet. App. 100a. Indeed, on appeal the Tenth Circuit affirmed the district court's substantive ruling in *Cherokee Nation*. *Cherokee Nation of Okla. v. United States*, 311 F.3d 1054, 1063 (10th Cir. 2002). The Ninth Circuit reached a similar conclusion that the Government was not liable for contract support cost shortfalls. *Shoshone-Bannock Tribes v. Sec'y, Dep't of Health & Human Servs.*, 279 F.3d 660 (9th Cir. 2002).

The Menominee Tribe "has limited resources and it has to very carefully weigh whether it will bring a case against the United States." Pet. App. 100a. The decision facing the Tribe following the appeal in *Cherokee Nation* was whether to devote substantial resources to litigate

its claims at that time, even though such litigation would be largely duplicative of the several contract support claims already pending in the federal courts (some of which resulted in circuit court rulings against liability), or to wait. The Tribe believed that the statute of limitations had been tolled during the pendency of the *Cherokee Nation* class certification motion (approximately two years), and that the Tribe therefore had more time to monitor developments in the contract support cost litigation and to make a more rational and informed decision based on the courts' determinations of liability.[14] Pet. App. 100a.

Meanwhile, the Cherokee Nation pursued claims for contract support for other fiscal years in a separate proceeding before the Interior Board of Contract Appeals ("IBCA"). In that proceeding the IBCA held the IHS liable. *Appeals of Cherokee Nation of Okla.*, 99-2 B.C.A ¶ 30,462 (I.B.C.A. 1999), reconsideration denied, 01-1 B.C.A. ¶ 31,349 (I.B.C.A. 2001). The IHS appealed the IBCA ruling and a circuit split was created in 2003 when the Federal Circuit agreed with the IBCA, declaring that there was a statutory right to full funding of contract support costs. *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003).

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[14] In 2001, the motion for class certification in *Zuni* was still pending, and no court had ruled that presentment of administrative claims was a requirement for class membership in the context of contract support cost litigation, let alone that it was a requirement for class action tolling. In the only contract support case where presentment had been raised as an issue—*Ramah*—the court continued to issue rulings that assumed the validity of the class. See, *e.g.*, *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1109 & 1111 (D.N.M. 1999); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1317-1319 (D.N.M. 2002).

This Court granted certiorari to resolve the conflict. *Thompson v. Cherokee Nation of Oklahoma*, 541 U.S. 934 (2004). The Tribe, acting on its belief that the *Cherokee Nation* class action had tolled the statute of limitations for putative class members, including Menominee, decided to wait for this Court to conclusively resolve the question of liability before filing its own claims and triggering another duplicative lawsuit. Pet. App. 100a. On March 1, 2005, this Court affirmed the Federal Circuit and overturned the Ninth and Tenth Circuits, holding that the ISDA sets out a duty to fully fund contract support costs and that the Government had to satisfy its contractual obligations out of unrestricted appropriated funds if they were available. *Cherokee*, 543 U.S. 631. Thereafter, on September 7, 2005, the Tribe filed its own contract support claims with the IHS. Pet. App. 101a.

After this Court ruled in *Cherokee* that the Government was liable for contract support cost underpayments, the stay was lifted in the *Zuni* case and the Government filed a motion to dismiss certain claims for failure to exhaust administrative remedies. See *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1101 (D.N.M. 2006). In 2007, the court in *Zuni* denied class certification on the grounds that many of the putative class members did not meet jurisdictional requirements under the CDA because they had not yet presented claims to the contracting officer. *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 443 (D.N.M. 2007). That 2007 ruling was the first to address the issue of presentment since the 1993 *Ramah* ruling, which had approved class certification, and thus the first indication from any court that presentment might be required for a tribe to claim membership in a puta-

tive class of ISDA contractors seeking contract support. By that time, however, Menominee had already filed its administrative claims.

III. Menominee's Claims and the Rulings Below

On September 7, 2005, following *Cherokee*, the Tribe filed claims for contract support cost underpayments in the years 1995 through 2004. Assuming the statute was tolled during the pendency of the *Cherokee Nation* class action, as Menominee had been advised by class counsel, the Tribe's claims were timely. The agency denied the claims for 1996 through 1998 on the basis that they were barred by the six-year statute of limitations in the CDA.[15] The Tribe appealed the denials directly to the federal district court as permitted by 25 U.S.C. § 450m-1 and 41 U.S.C. § 7104 (which was then 41 U.S.C. § 609). In 2008, the district court held that the claims were time-barred and that the statute of limitations was jurisdictional and thus not subject to tolling. Pet. App. 70a.

On appeal, the D.C. Circuit held that the Tribe could not claim the benefit of class action tolling under *American Pipe & Construction Co. v. Utah*, which established that "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. 538, 554 (1974) ("*American Pipe*"). The D.C. Circuit reasoned that Menominee could not have been a member of the *Cherokee Nation* class even if had it been certified because the Tribe

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[15] IHS denied the 1995 claim, which was not subject to the statute of limitations, on the basis of laches. The district court upheld IHS's decision but was reversed on appeal. Pet. App. 66a-67a. The parties subsequently settled the 1995 claim.

had failed to meet the jurisdictional requirement to exhaust administrative remedies. Pet. App. 57a-58a. The Federal Circuit reached a similar conclusion in *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 795 (Fed. Cir. 2009) ("*ASNA I*"), cert. denied, 561 U.S. 1026 (2010).[16] The Federal Circuit's *ASNA I* ruling in 2009 and the D.C. Circuit's *Menominee II* ruling in 2010 were the first to extend the *Zuni* court's reasoning to hold that presentment was a requirement for class action tolling.

Despite holding that class action tolling was not available, the D.C. Circuit held that the CDA six-year statute of limitations is not jurisdictional and is thus subject to equitable tolling. The D.C. Circuit therefore remanded for a determination of whether equitable tolling was appropriate under the facts of the case. Pet. App. 62a-65a.

On remand, Menominee argued that its reasonable reliance on the *Cherokee Nation* class action to toll the limitations period, the unpredictable changes in the legal landscape surrounding contract support, and the futility and expense of submitting its own claims at an earlier time created extraordinary circumstances under which the Tribe acted with reasonable diligence in monitoring the changing legal landscape and determining whether and when to submit its claims. The Tribe argued that these circumstances entitled it to equitable tolling even if class action tolling could not apply. Pet. App. 32a; Pl. Br. in Opp. to Mot. to Dismiss 19-23. The Tribe also argued that the federal trust responsibility to Indian tribal governments and the lack of prejudice to the Government in this case

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[16] This Court has not addressed the applicability of class action tolling under these circumstances.

weighed in favor of equitable tolling. Pl. Reply Br. 22-24; Appellant's C.A. Reply Br. 23. The district court disagreed, and ruled on summary judgment that the claims were time-barred. Pet. App. 37a.

On appeal, the D.C. Circuit affirmed. Pet. App. 2a. The D.C. Circuit acknowledged that "equitable tolling must be applied flexibly, case by case, without retreating to 'mechanical rules' or 'archaic rigidity[,]'" and that in applying *Holland* "courts must keep in view equity's purposes: correcting particular injustices and 'reliev[ing] hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules.'" Pet. App. 10a (internal citations and quotations omitted). The court nevertheless concluded that "The Menominee Tribe faced no extraordinary circumstances because the obstacles the Tribe confronted were ultimately of its own making. [. . .] *At no point was the Tribe prevented by external obstacles from timely filing*." Pet. App. 12a (emphasis added). The court further concluded that the circumstances could not justify equitable tolling even if considered cumulatively, stating:

> [N]one of the many factors the Tribe identifies are external obstacles that prevented the Tribe from bringing its claims. Some are not obstacles. Neither the "unique government-to-government and trust relationship between the United States and the Tribe," nor the "litigation history" surrounding contract support cost claims, were capable of standing in the Tribe's way. Others we cannot accept. If a lawsuit's "breadth and complexity" were an "extraordinary circumstance," few statutes of limitations would function. And the remaining circumstances—the Tribe's mistaken belief that it would be entitled to class-action

> tolling and that its claims had no hope of success—were the Tribe's own missteps. On the facts of this case, we cannot conclude that a series of events, none extraordinary on its own, piled up to create an extraordinary obstacle.

Pet. App. 18a-19a (internal citations omitted). Finding no such "obstacle," the court of appeals determined that it "need not pass on whether, under *Holland*'s first prong, the Tribe pursued its rights diligently" and that it need not consider "other equitable 'factors,' such as whether the Government would be prejudiced by the application of equitable tolling in this case, or whether equitable tolling should be more readily available to tribes given their special relationship to the United States." Pet. App. 12a n.4.

The D.C. Circuit's approach contrasted sharply (and explicitly) with the Federal Circuit's equitable tolling analysis in *ASNA II*, which involved materially similar facts.[17] The majority in *ASNA II* found that both *Holland* prongs were satisfied, and equitable tolling was warranted, because the contract support litigation

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[17] ASNA had chosen to appeal the IHS's denial of its claims to the Civilian Board of Contract Appeals ("CBCA"), as permitted under 25 U.S.C. § 450m-1(d) and 41 U.S.C. § 7104(a). Following a decision on appeal by the Federal Circuit that class action tolling did not apply in ASNA's case but that the CDA six-year statute of limitations was subject to equitable tolling, a two-judge majority of the CBCA panel held that ASNA had not established facts to justify equitable tolling. See *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009); *Arctic Slope Native Ass'n*, 11-2 B.C.A. ¶ 34,778 (C.B.C.A. 2011). In the CBCA, Board Judge Candida S. Steel filed a thoughtful dissent arguing that the facts justified equitable tolling in light of the *Ramah* precedent, Congressional intent in the ISDA, and the federal obligations flowing from the unique federal-tribal relationship embodied in that Act. *Id.*

landscape represented "unique facts and extraordinary circumstances," and ASNA acted with reasonable diligence in light of the changing legal landscape. Pet. App. 90a & 91a. The court addressed ASNA's reliance on putative membership in class action proceedings (in that case, the *Zuni* class action) and rejected the Government's argument that ASNA should have taken affirmative action to file individual claims despite the *Ramah* precedent. The Federal Circuit opinion concluded:

> Monitoring and reasonably interpreting applicable legal proceedings, judicial order [sic] and opinions, and taking action as necessary does not constitute sleeping on one's rights, particularly in the class action context where parties who believe they are putative class members often remain passive during the early stages of the litigation allowing the named class representatives to press their claims.

Pet. App. 88a-89a. The Federal Circuit reasoned that ASNA acted diligently by participating as a class member in the *Ramah* and *Zuni* litigations and by filing its claims individually in 2005 once it realized that the Government would challenge the *Ramah* precedent. The Federal Circuit ruled that "given the existence of the unambiguous court order [in *Ramah*] that specifically addressed the exhaustion of remedies issue and the fact that ASNA diligently pursued its rights by monitoring the relevant legal landscape, ASNA took reasonable, diligent, and appropriate action as the legal landscape evolved." Pet. App. 89a-90a.

In addition, the Federal Circuit found that tolling the limitations period was "not fundamentally unfair" to the Government because the *Zuni* complaint put the Government on notice of ASNA's contract support

claims, alerting it to the need to preserve evidence, which in any event consisted only of documents in the administrative record. Pet. App. 90a. The Federal Circuit also acknowledged that the special relationship between the Government and Indian tribes "is especially crucial under the ISDA, which Congress passed to facilitate and promote economic growth and development amongst the Indian tribes." Pet. App. 90a. The Federal Circuit concluded that, "[a]lthough not dispositive, the existence of the special relationship between the government and Indian tribes supports our holding." Pet. App. 91a.

The D.C. Circuit below acknowledged the Federal Circuit's decision in *ASNA II*, but elected not to follow the majority view in that case, stating: "In our view, the *Arctic Slope II* majority failed to identify any obstacle that stood in the Tribe's way to prevent timely filing of its claims, as required by *Holland*'s second prong." Pet. App. 14a n.5. This Court granted certiorari in order to determine whether, in rejecting the Federal Circuit's approach, the D.C. Circuit correctly interpreted and applied the *Holland* test.

SUMMARY OF ARGUMENT

The D.C. Circuit's narrow inquiry failed to engage in the type of holistic, fact-specific analysis that *Holland*, and the broader equitable principles it embodies, require. A court sitting in equity should properly consider all the relevant facts and circumstances, but the D.C. Circuit failed to consider the Tribe's diligence at all. Not only is diligence a key component of the *Holland* two-part test, this Court's decisions require that the diligence and extraordinary circumstances prongs of that test be considered together as part of a complete

analysis of all the relevant factors and circumstances.[18] As illustrated by the Federal Circuit's approach in *ASNA II*, in applying *Holland* the D.C. Circuit should have considered the circumstances surrounding the contract support cost litigation in light of the Tribe's diligence in "[m]onitoring and reasonably interpreting applicable legal proceedings, judicial order and opinions, and taking action as necessary[,]"[19] all of which established strong grounds for equitable tolling of the statute of limitations in this case.

Instead, with no rationale or explanation, the D.C. Circuit isolated the "extraordinary circumstances" prong of the *Holland* test and determined that it could not be satisfied in the absence of some specific "external obstacle." *Holland*, however, makes no mention of "external obstacles." Moreover, this Court in *Holland* rejected the Eleventh Circuit's similar "*per se* approach," emphasizing that the exercise of equitable powers must be made on a "'case-by-case' basis, rather than according to 'mechanical rules.'" 560 U.S. at 649-50.

Under any test, it cannot be disputed that this case involves an unusual (and unusually complex) set of facts. Together, the Tribe's experience in *Ramah* and class counsel's advice in *Cherokee Nation* led the Tribe to reasonably believe that the statute of limitations had been tolled during the two years that the *Cherokee Nation* class action was pending. After class certification was denied, but prior to this Court's decision in *Cherokee*, the viability of the Tribe's claims was doubtful, as the two circuit courts to address liability ruled in favor of the Government. At that point in time, the Tribe's

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[18] See *Holland*, 560 U.S. at 652; *Pace v. DiGuglielmo*, 544 U.S. 408, 418-19 (2005).

[19] See Pet. App. 88a.

lack of financial resources to litigate legally questionable claims against the Government and its reasonable belief that class action tolling had extended the deadline to file its claims drove the Tribe's decision to use the time it believed it had left to monitor the ongoing contract support litigation and evaluate the wisdom and utility of filing its own claims.

The Tribe filed shortly after the Government's liability was established by this Court in *Cherokee*, believing its claims were timely. It was not until two years later that the *Zuni* court ruled against class certification on presentment grounds, for the first time undermining the *Ramah* precedent establishing that class participation would be permitted with or without presentment, and not until 2009 and 2010 that the Federal Circuit and the D.C. Circuit applied the *Zuni* court's reasoning to exclude non-presenters from class action tolling. Prior to filing its claims, Menominee had no basis for predicting the *Zuni* court's later reversal of *Ramah* or the resulting consequences for the application of class action tolling; the *Ramah* case had continued as a class action and no other court had addressed presentment in the contract support context.

The D.C. Circuit rejected each of these factors and circumstances—individually and cumulatively—as insufficient to justify equitable tolling based on its application of a novel and rigid "external obstacle" test. Pet. App. 12a-18a. The court's application of that test not only precluded the holistic and equitable analysis of the facts that *Holland* requires and that the Federal Circuit applied in *ASNA II*, it also precluded consideration of other factors relevant in equity and entitled to weight in this case. First, while not determinative, it is relevant that the Government was well aware of Menominee's claims as a result of

the *Cherokee Nation* and *Zuni* class actions,[20] and that the Tribe's claims rely solely on documentary evidence such that the delay in filing does not prejudice the Government in defending against them. Second, the existence of a special relationship between the parties is relevant in equity, and as the Federal Circuit ruled in *ASNA II*, the obligations flowing from the special relationship between the Government and the tribes favors equitable tolling, especially in an ISDA case. Pet. App. 90a.

ARGUMENT

I. The D.C. Circuit misapplied *Holland* by failing to consider both prongs of the equitable tolling test as part of a holistic, fact-based analysis.

In applying *Holland* to assess whether equitable tolling should apply to Menominee's claims, the D.C. Circuit failed to consider whether the Tribe had exercised reasonable diligence in pursuing those claims. Consideration of the claimant's diligence is, however, a fundamental component of any equitable analysis and is particularly important in the application of the *Holland* test. See, *e.g.*, *Holland*, 560 U.S. at 649 & 653; *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("*Irwin*"); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).[21] In this case, Menominee's diligence in

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[20] See, *e.g.*, *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429-30 (1965).

[21] As summarized by Justice Story in his treatise on equity jurisprudence, "where an inequitable loss or injury will otherwise fall upon a party from circumstances beyond his own control, or from his own acts done in entire good faith, and in the performance of a supposed duty, *without negligence*, Courts of Equity will interfere to grant him relief." 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 89 (6th ed. 1853) (emphasis added).

consciously tracking (and relying on) the contract support class action proceedings, then later monitoring the development of legal precedent, and finally in ensuring that its claims were filed before the expiration of the time Menominee reasonably believed it had to file, justifies equitable tolling in a balance of the equities.

The circuit panel's fundamental error stemmed from its misinterpretation of the two-pronged *Holland* test. The two components of the *Holland* test—diligence and extraordinary circumstances—are not discrete, mutually exclusive factors to be applied separately, as the D.C. Circuit did. Rather, the nature of equity jurisdiction and this Court's equitable tolling jurisprudence establish that extraordinary circumstances *in light of* a party's reasonable diligence—and in light of the equities as a whole—are what validate a claim to equitable tolling. *Holland* thus requires a more holistic and complete analysis of all the factors and circumstances establishing both the diligence and extraordinary circumstances requirements, in light of the relation they bear to each other and to other equitable factors.

First, a court sitting in equity must consider *all* of the relevant facts and circumstances. Whereas the courts of law are limited to certain forms of action and to specific remedies, in contrast "one of the most striking and distinctive features of Courts of Equity is, that they can adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest[.]" 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 28 (6th ed. 1853) (hereinafter "STORY"). This Court thus noted in *Holland* that "often the 'exercise of a court's equity powers . . . must be made on a case-by-case basis.'" 560 U.S. at 649-50 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)). That case-by-case

analysis cannot take place unless a court considers the totality of the circumstances, including whether the party acted with reasonable diligence and good faith.

With respect to equitable tolling specifically, the *Holland* decision illustrates how diligence and extraordinary circumstances function together to establish grounds for tolling, and therefore must be analyzed in tandem. *Holland* involved a death row inmate seeking equitable tolling of the Antiterrorism and Effective Death Penalty Act's one-year statute of limitations for filing a habeas corpus petition. *Holland*, 560 U.S. at 653. The circumstances that had "prevented" timely filing of Holland's petition were simply the failure of his attorney to account for the filing deadline and to file the petition on time. As the Court noted, these two facts alone established only that Holland's attorney had acted negligently, and did not rise to the level of "extraordinary circumstances." *Id.* at 652. Nevertheless, the Court proceeded to consider additional facts establishing Holland's diligence, which were compelling: Holland, for example, wrote many letters to his attorney that "repeatedly emphasized" the importance of identifying and complying with the filing deadlines in his case. *Id.* The Court suggested that the circumstances of the attorney's negligence became extraordinary in light of Holland's forceful and diligent efforts to gain his attorney's attention and to ensure that his petition would be timely filed. *Id.* The Court then remanded the case for a more detailed consideration of *all* the pertinent facts in a manner more consistent with equity's purpose.[22]

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[22] In remanding the case, the Court noted that the district court had focused exclusively on diligence (which it erroneously found lacking), while the Eleventh Circuit had utilized an overly strict rule for extraordinary circumstances. Thus, the Court

The equitable tolling standard in *Holland* has its roots in this Court's decisions in *Irwin* and *Pace v. DiGuglielmo* (544 U.S. 408 (2005) ("*Pace*")), decisions which confirm that the holistic nature of the test requires an analysis of *all* the circumstances present in the case and their bearing on each other. In *Irwin* the Court began its equitable tolling analysis by noting that "Federal courts have typically extended equitable relief only sparingly[,]" (i.e., in extraordinary circumstances). But in describing circumstances rising to that level, the Court focused largely on diligence, explaining:

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin, 498 U.S. at 96 (footnotes omitted).

In *Pace*, this Court first framed the equitable tolling test as having "two elements: (1) that [the litigant] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." 544 U.S. at 418 (citing *Irwin*, 498 U.S. at 96). Although the Court separately identified these two requirements, its analysis of them was unitary and holistic, focusing

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found that "no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief" consistent with the two-element test. *Holland*, 560 U.S. at 653-54.

on diligence *in light of* the circumstances. The Court found that the petitioner in that case "waited years, *without any valid justification*," to assert his claims, and therefore could not benefit from equitable tolling. *Pace*, 544 U.S. at 419 (emphasis added).

The lesson to be gleaned from *Holland* and its predecessor cases is that equitable tolling requires a claimant to show that he or she acted with reasonable diligence, but that due to some extraordinary set of circumstances, that diligence was rendered ineffective. It is true that both factors must ultimately be present in order for tolling to occur, but since extraordinary circumstances may be defined with reference to a claimant's diligence (as in *Holland* itself), diligence is never irrelevant. The Federal Circuit's approach in *ASNA II* was consistent with these principles, considering the extraordinary facts of the series of contract support class actions in light of ASNA's reasonable diligence as a class member monitoring the legal developments specific to its circumstances.[23] Like ASNA, Menominee acted with at least the reasonable diligence required of it under the circumstances—a fact that should not have been ignored in this case.

II. The D.C. Circuit misconstrued the "extraordinary circumstances" test to require proof that an "external obstacle" affirmatively prevented filing.

Not only did the court of appeals below limit its analysis to the second prong of the *Holland* test, but it also applied a distorted interpretation of that prong to

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[23] The D.C. Circuit expressly declined to follow the Federal Circuit in *ASNA II* on the grounds that the panel majority in that case failed to "separately" address the extraordinary circumstances and diligence prongs. Pet. App. 14a n.5.

demand that an "external obstacle" stood in the way of timely filing. *E.g.*, Pet. App. 12a & 18a. The *Holland* test requires "extraordinary circumstances," not "obstacles." While an external obstacle may constitute an "extraordinary circumstance," such obstacles are not the only kind of extraordinary circumstances that satisfy *Holland*. Moreover, *Holland* instructs that the extraordinary circumstances test, consistent with the exercise of equitable jurisdiction generally, is flexible enough to account for the variety of unforeseen circumstances that may warrant equitable relief. 560 U.S. at 650. Menominee has established that several related factors combined to create the extraordinary circumstances that resulted in the Tribe missing the filing deadline, which it believed had been extended. These facts justify the application of equitable tolling and should not have been dismissed by the court below.

A. The *Holland* test requires "extraordinary circumstances," not "obstacles," and involves a flexible, case-by-case analysis.

Courts sitting in equity are more flexible in their procedures and remedies than courts at law, which, due to the constraints inherent in their jurisdiction, are oftentimes "incapable of the remedy, which the mutual rights and relative situations of the parties, under the circumstances, positively require," STORY § 27. Thus, equitable procedures enable courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices" which otherwise would find no legal remedy. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944).

Courts of equity are not entirely unbound from precedent; as this Court noted in *Holland*, "[w]e have said that courts of equity 'must be governed by rules and precedents no less than the courts of law.'" 560 U.S at 649 (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)). Nonetheless, the Court emphasized that the exercise of equity powers does not involve the perfunctory application of rigid tests:

> In emphasizing the need for "flexibility," for avoiding "mechanical rules," . . . we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity[.]"

Id. at 650 (internal citations omitted) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) & *Hazel-Atlas Glass Co.*, 322 U.S. at 248).

In *Holland*, this Court rejected the "overly rigid *per se* approach" to the "extraordinary circumstances" test that had been applied by the Eleventh Circuit. 560 U.S. at 653. That court had found, as a rule, that "even attorney conduct that is 'grossly negligent' can never warrant tolling absent 'bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part[,]'" and therefore Holland could not qualify for equitable tolling despite the unique facts of his case. *Id.* at 649. This Court stated that the Eleventh Circuit's standard was "too rigid" in light of the equitable precedent, and went on to explain that courts of equity must "exercise judgment in light of prior precedent, but with awareness of the fact that specific circum-

stances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* at 649-50.[24]

The *Holland* Court concluded that the Eleventh Circuit's strict and specific rule was "difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id.* at 651.

Like the Eleventh Circuit in *Holland*, the D.C. Circuit in this case adopted a "rigid *per se* approach" to equitable tolling by essentially replacing the "extraordinary circumstances" requirement with an "external obstacle" test. Pet. App. 12a & 18a. However, there is nothing in *Holland*'s extraordinary circumstances test that requires the presence of a specific "obstacle," and certainly not as that term was applied by the D.C. Circuit. To the contrary, the *Holland* test is flexible enough to recognize that, "at least sometimes," other facts and

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[24] Similarly, in a recent case this Court rejected an "unduly rigid" and "mechanical" test adopted by the Federal Circuit in place of the "holistic, equitable approach" previously used by the courts to apply the Patent Act's fee-shifting provision, which authorizes district courts to award attorney's fees to prevailing parties in "exceptional cases." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1754 & 1755 (2014). The Federal Circuit's formulation inflexibly limited "exceptional cases" to two specific circumstances involving sanctionable misconduct or bad faith. This Court held that the "exceptional cases" standard, to the contrary, requires district courts to "determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." *Id.* at 1756.

circumstances when viewed as a whole could be extraordinary enough to justify equitable tolling.

B. The facts of this case establish that extraordinary circumstances prevented timely filing despite Menominee's diligent efforts.

In this case, the unique legal context created by the long-running dispute over contract support costs, the resulting national litigation and class action precedent, and the after-the-fact decisions on the presentment requirement in *Zuni* and *Menominee II* were among the several factors that together composed the "circumstances" faced by Menominee.[25] These circumstances, particularly in light of Menominee's limited resources and its unique relationship to the Government under the ISDA, rise to the level of extraordinary and establish grounds for equitable tolling under any reasonable test.

1. Ramah *and* Cherokee Nation *class actions.* The court below dismissed the Tribe's reliance on the *Cherokee Nation* class action as a basis for its decision to delay filing an administrative claim. The court determined that it was unreasonable for Menominee to believe it could participate in the *Cherokee Nation* class (or benefit from tolling as a result of the case) without exhausting its administrative remedies, because despite *Ramah*, "the weight of legal authority

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[25] Under *Holland*, it is the totality of the circumstances rather than each individual factor that must be "extraordinary" in order to justify equitable tolling. 560 U.S. at 652 (noting that facts regarding the conduct of Holland's attorney "alone, might suggest simple negligence[,]" but concluding that in light of other facts in the case the circumstances considered as a whole could rise to the level of extraordinary).

was to the contrary." Pet. App. 14a. The court also determined that "[t]he Tribe's reliance on *Ramah* as a reason to expect that it was eligible to participate in the *Cherokee* class was the Tribe's miscalculation, not an external circumstance beyond its reasonable control." *Id.*

The existence of the *Ramah* class action, however, was one of several significant factors outside of Menominee's control that combined to create the extraordinary circumstances under which Menominee was reasonably led to believe it need not (and *should* not) file individual claims in order to diligently pursue its contract support claims against the IHS.

Prior to *Cherokee Nation*, the *Ramah* class certification order was the only ruling addressing class certification in the context of the tribal contract support cost claims. That ruling *approved* class certification over the Government's objection that class members had not met the presentment requirements under the CDA, and was based on unique features of the contract support litigation that distinguished that context from others and from the "weight of authority" on class action and presentment.[26] J.A. 39. When *Cherokee Nation* was filed, then, *Ramah* was directly applicable and confirmed

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[26] The D.C. Circuit's generic conclusion that "the weight of legal authority was to the contrary" with respect to whether each class member must separately exhaust administrative remedies does not reflect the kind of fact-specific inquiry required in an equitable analysis. See *Holland*, 560 U.S. at 650. In this case, the result of class action certification in *Ramah* may have been unique in the broader legal context, but *Ramah* was directly on point and addressed the specific issues unique to the contract support cost litigation. Under the specific facts of this case, then, it was reasonable for Menominee to rely on *Ramah* rather than other authority addressing different situations.

that Menominee could rely on the class action as a means of pursuing its claims or, at the least, rely on class action tolling as a putative class member if the class action ultimately failed. Class counsel likewise advised all tribes that filing the *Cherokee Nation* case as a class action "has the effect of stopping the running of any statute of limitations against individual tribes eligible for membership in the class." J.A. 34.

After certification of the *Cherokee Nation* class was denied, there was no new reason to believe that tolling would not apply. The *Cherokee Nation* court specifically declined to address *Ramah* in denying class certification, noting that its ruling was based on Federal Rule of Civil Procedure 23 and not presentment. *Cherokee Nation*, 199 F.R.D. at 366 n.1. The *Ramah* certification order remained the only decision of any court addressing presentment in the tribal contract support context. Meanwhile, the *Ramah* court continued to issue rulings adding claims and approving settlements, all of which were premised on the validity of the class.[27] It was not until 2007, when the district court denied class certification in *Zuni*, that any court ruled that presentment was required for participation in a class of tribal contractors bringing contract support claims. It was not until 2009 that presentment was held by any court to be a requirement for class action tolling.

Thus, prior to 2005, when Menominee filed its claims, there was no reason for the Tribe to believe either that it would have been precluded from participating in the

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[27] See *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1109 & 1111 (D.N.M. 1999) (approving partial settlement); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1317-1319 (D.N.M. 2002) (discussing addition of claims and approving second partial settlement).

Cherokee Nation class had the class been certified, or that it would be precluded from the benefit of class action tolling on presentment grounds. The change in the law governing presentment in the tribal contract support context—which happened after the Tribe filed its claims—was therefore an extraordinary factor beyond Menominee's control that ultimately prevented it from timely filing. *Cf. Harris v. Carter*, 515 F.3d 1051, 1057 (9th Cir. 2008) (holding statute equitably tolled where petitioner relied on circuit court precedent, later overruled by the Supreme Court, establishing that the deadline to file his claims would be tolled).

Menominee's reliance on *Cherokee Nation* also establishes that it acted with reasonable diligence under the circumstances. In *Irwin*, this Court stated that reliance on a defective pleading—including a defective class action—constitutes grounds for equitable tolling, because under such circumstances "the claimant has actively pursued his judicial remedies[.]" 498 U.S. at 96. The Court cited *American Pipe* as an example of a case where "plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members." *Id.* at 96 n.3. Menominee argued in both the district court and the court of appeals that the *Cherokee Nation* class action was a defective pleading that constituted grounds for equitable tolling under *Irwin*; however, the D.C. Circuit failed to even address that argument.[28]

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[28] The district court in *Menominee III* dismissed the *Irwin* Court's analysis, because *American Pipe* was decided on the basis of class action tolling rather than equitable tolling. Pet. App. 37a & n.8. However, the fact that *American Pipe* was decided on class action tolling grounds does not mean that the Court could not cite that case as an example of a set of facts that would satisfy the requirements for equitable tolling.

The D.C. Circuit's analysis would preclude equitable tolling under the same circumstances identified by this Court in *Irwin* as appropriate for tolling–underscoring the fact that the court of appeals applied an overly rigid and narrow test.[29] There was no "obstacle" that prevented the members of the putative class in *American Pipe* from filing individual claims; rather, tolling was warranted because they reasonably relied on a class action that proved defective. 414 U.S. at 538. The D.C. Circuit likewise should have considered Menominee's reliance on the *Ramah* and *Cherokee Nation* class actions as factors contributing to the type of "extraordinary circumstances" required under *Holland* and *Irwin*.

2. *Futility of exhausting administrative remedies and the desire to avoid duplicative and baseless litigation.* The court of appeals also concluded that the futility of exhausting administrative remedies in this case "fail[ed] to clear the 'extraordinary circumstance' threshold." Pet. App. 15a. The court acknowledged the Tribe's arguments that the IHS would almost certainly deny the Tribe's claims, but found that Menominee nevertheless should have filed because "[t]he federal courts, not contracting officers, are the final word on federal law" and Menominee possibly could have succeeded in litigation. Pet. App. 15a-16a.

But Menominee's decision to hold off on filing claims that would inevitably be rejected by the IHS did not ignore the primacy of the federal courts in interpreting federal law. To the contrary, during the pendency of

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[29] *Holland* did not in any way alter *Irwin*'s reasoning, and in fact the equitable tolling test stated in *Holland* derives from *Irwin*. In adopting the two-part test, *Holland* relies on *Pace*, 560 U.S. at 655, and *Pace* in turn relies on *Irwin*, 544 U.S. at 418.

the *Cherokee Nation* class action (a time when, the D.C. Circuit pointed out, "no circuit had [yet] excused the government from its obligation to fully fund contract support costs out of unrestricted appropriations," Pet. App. 16a), Menominee believed there was no need to pursue separate litigation because it was *already* participating in litigation as a member of the class.[30] After class certification was denied, Menominee believed that it need not act immediately because the deadline to file had been extended. In light of Menominee's limited resources and the fact that other tribes and tribal organizations were *already* litigating the same issues in several federal courts, Menominee chose to monitor the pending litigation to see whether liability would be conclusively established rather than immediately file its own duplicative suit. In other words, Menominee decided to wait for the federal courts to issue the "final word" on liability, recognizing that in

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[30] The Tribe's actions were consistent with the presumption that the complaint filed in a class action is filed on behalf of all proposed class members and thereby stands as a properly filed lawsuit until the class certification is resolved. For class actions, it is anticipated that putative class members—and those who reasonably believe they are class members—will not act to file their own pleadings. As explained by the Court, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal Co.*, 462 U.S. 345, 352–53 (1983). See also *Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1987) (Potential members of a putative class "are expected and encouraged to remain passive during the early stages of the class action and to 'rely on the named plaintiffs to press their claims.'" (quoting *Crown, Cork & Seal Co.*, 462 U.S. at 353)), cert. denied *sub nom. Nassau Cnty. Republican Comm. v. Cullen*, 483 U.S. 1021 (1987). In this context, monitoring the legal landscape is the critical activity demonstrating reasonable diligence. Pet. App. 88a-89a.

the meantime pursuing its own separate claims would be futile and would add nothing new to the existing federal court proceedings except expend greater resources while the existing litigation made its way to this Court.

Not only did Menominee's decision serve to protect its limited tribal resources, it also served to preserve federal administrative and judicial resources. There were hundreds of tribes with likely claims against the IHS for unpaid contract support costs. See *Cherokee Nation*, 199 F.R.D. at 361 (noting an IHS report showing that at least 296 of 329 contracting tribes experienced a shortfall due to the IHS's failure to pay full contract support). The toll on the federal courts, and on the Government in defending against those claims, would have been enormous had every tribal contractor believed it needed to initiate its own lawsuit simply to preserve the viability of its claims in the time period before the question of liability reached this Court. Indeed, class action tolling is based on precisely these considerations of judicial economy and avoiding needless "protective" litigation. *American Pipe*, 414 U.S. at 553-54.

Running contrary to these policy considerations, the D.C. Circuit's reasoning would have claimants aggressively and intentionally pursue duplicative litigation against the Government as a precautionary measure, in case their reasonable belief that the statute of limitations has been tolled is later determined to be wrong. If they do not, they will be forever barred from the benefits of equitable tolling, regardless of the surrounding circumstances, because they will not be able to prove that any "external obstacle" prevented them from prevailing on their claims within the limitations period had they filed suit. Such a rule would make no sense

as a general matter, but it would be particularly misplaced in the context of this contract support litigation. The contract support cost requirement reflects a congressional recognition that many tribes, like Menominee, have no margin to absorb administrative costs. Forcing those same tribes to absorb litigation costs simply to preserve their claims even when they had a good faith belief their claims were tolled offends both equity and common sense.

3. *Risk and expense of filing individual claims.* Menominee's lack of financial resources prevents the Tribe from pursuing every potential claim it may have against the Government or any other well-funded adversary, and stood in the way of the Tribe's filing a claim prior to this Court's ruling in *Cherokee*. The court of appeals only superficially acknowledged this factor, and failed to realistically assess its effect on the Tribe's course of action. The court stated:

> Even assuming the Menominee Tribe lacked the resources to pursue its own litigation in federal court, its eligibility to participate in the *Cherokee Nation* class would have required nothing more than some paperwork. [. . .] What stood between the Tribe and class-action tolling was little more than an envelope and a stamp.

Pet. App. 17a.

There are several flaws in the court's reasoning. First, although the procedure for filing an administrative claim may be simple, the substantive requirements governing the content of a claim alleging contract support cost underpayments are not. The CDA requires that all claims of more than $100,000 be certified by an individual authorized to bind the contractor with

respect to the claim. 41 U.S.C. § 7103(b). The contractor must certify, among other things, that the claim is made in good faith; that "the supporting data are accurate and complete to the best of the contractor's knowledge and belief"; and that "the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable." *Id.* Pursuant to IHS policy, the amount of contract support costs owed is calculated by application of a negotiated indirect cost rate to the direct cost base, which consists of program funding less applicable exclusions and pass-through funds, all of which must be correctly identified according to applicable laws, policies, and circulars. IHS, INDIAN HEALTH MANUAL § 6-3.2E; Pet. App. 101a. In fact, preparation of accurate contract support cost claims consistent with IHS policy and applicable case law requires highly specialized accounting and legal expertise,[31] and is far from being a simple and inexpensive matter.[32]

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[31] See IHS, INDIAN HEALTH MANUAL § 6-3.2E & Exhibit 6-3-H, *available at* http://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_pc_p6c3; *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) ("*Ramah II*").

[32] The irony, of course, is that the very basis of Menominee's claims is that the Government failed to provide the full amount of administrative and overhead costs necessary for activities such as accounting—costs which Congress recognized tribes could not necessarily sustain on their own. S. REP. NO. 100-274, at 8-9 (1988). That Menominee would be penalized for the need to ration these acknowledgedly meager resources in this case is perhaps doubly ironic, given that the Tribe's acute poverty can be traced directly to the Government's actions in purporting to "terminate" its federal trust responsibilities to the Tribe without taking any account of the impacts that sudden termination would have in light of the paternalistic management of tribal affairs up to that point. *Menominee Indian Tribe of Wis. v. United States*, 39 Fed. Cl. 441, 450-456 (1997). This predicament stood in the Tribe's

The court's harsh assessment also ignores the fact that the contracting officer's denial of Menominee's claim (which was all but certain) would have triggered separate deadlines for Menominee to challenge the claim denials. 41 U.S.C. § 7103(g) (a contracting officer's decision on a claim is final unless timely appealed); 41 U.S.C. § 7104 (requiring appeal of a contracting officer's decision to an agency board within 90 days, or alternatively, an appeal to the Court of Federal Claims within 12 months). The "envelope and a stamp" only *begins* the claims process, which then triggers several additional (and far more costly) steps which must be taken in order to preserve the claim. As this very case illustrates, what begins as an administrative claim can easily turn into years of litigation and multiple appeals, all the way to the United States Supreme Court—litigation which may be averted only by abandoning the claims.[33] Further, while *Cherokee Nation*

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way and, under any reasonable and considered application of the equitable tolling test, was an extraordinary circumstance that prevented the Tribe from timely filing.

[33] Prior to this Court's ruling in *Cherokee*, the IHS aggressively resisted liability for full contract support costs in every jurisdiction where these cases were litigated, raising every possible substantive and procedural defense. See, *e.g.*, *Appeals of Cherokee Nation of Okla.*, 01-1 B.C.A. ¶ 31,349 (I.B.C.A. 2001) aff'd *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003) aff'd & remanded, *Cherokee*, 543 U.S. 631 (2005); *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248 (E.D. Okla. 2001) aff'd, 311 F.3d 1054 (10th Cir. 2002) rev'd, *Cherokee*, 543 U.S. 631 (2005); *Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 58 F. Supp. 2d 1191 (D. Or. 1999) rev'd, 269 F.3d 948 (9th Cir. 2001) amended & superseded, 279 F.3d 660 (9th Cir. 2002). Even after *Cherokee*, as this case demonstrates, the IHS has sought in many cases to avoid liability on various procedural grounds. See, *e.g.*, *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009); *Tuba City Reg'l Health Care Corp. v. United States*, 39 F. Supp. 3d 66, 67 (D.D.C. 2014); *Pueblo of Zuni v.*

was pending, pursuing the required appeals would have threatened Menominee's ability to participate as a member of the *Cherokee Nation* (or any other) class.[34]

The court of appeals suggested that Menominee could have avoided litigation by filing its administrative claims and *then* relying on class action tolling to preserve its appeal rights. Pet. App. 17a. That was certainly not assured at the time, and is not entirely clear even now. For years, courts held that the statute of limitations for challenging a contracting officer's final decision in court—which is separate and distinct from the six-year statute of limitations to file an initial claim with the agency—was "jurisdictional" and could not be tolled. See, *e.g.*, *Renda Marine, Inc. v. United States*, 71 Fed. Cl. 782, 789 (2006) (citing numerous cases from the 1990's holding that failure to comply with the appeal deadline divests a court of jurisdiction).[35] The courts interpreted the CDA limitation on

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United States, 243 F.R.D. 436 (D.N.M. 2007); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006).

[34] According to the government, an appeal to the Interior (now, Civilian) Board of Contract Appeals before the 90-day deadline would have excluded Menominee from the *Cherokee Nation* class. *Cherokee Nation*, 199 F.R.D. at 362 (summarizing U.S. argument that class must "exclude tribes that are litigating or have litigated cases in other judicial or administrative forums.").

[35] *Renda Marine* was affirmed in *Renda Marine, Inc. v. United States*, 509 F.3d 1372 (Fed. Cir. 2007). While the courts refusing to toll the CDA's limitations on appealing a contracting officer's decision did so in the context of equitable tolling rather than *American Pipe* class action tolling, there was no reason to believe that class action tolling could apply to a jurisdictional statute where equitable tolling could not. Indeed, just last Term, this Court appeared to observe that if Congress had intended the Clayton Act—the statute of limitations at issue in *American Pipe*—to be jurisdictional, tolling would *not* have been available. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1634-35 & 1635

appeals in light of the statute's finality provision: "The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or suit is timely commenced as authorized by this chapter." 41 U.S.C. § 605(b) (now 41 U.S.C. § 7104(g)); *Renda Marine, Inc.*, 71 Fed. Cl. at 789. Since the CDA specifically speaks to the jurisdiction of the courts and appeal boards *after* a contracting officer has rendered a decision, if Menominee had filed claims with the agency but failed to appeal, the Government would certainly have argued, as it did in a later contract support case, that the appeal deadline is "jurisdictional" and not subject to *American Pipe* tolling. See *Ramah Navajo Sch. Bd., Inc. v. United States*, 83 Fed. Cl. 786, 800 (2008).[36] See also, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632-33 (2014) (distinguishing between statutes of limitations that function as mere "claim-processing rules" and those that speak directly to the jurisdiction of the courts).

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n.8 (2014); *cf. id.* at 1636; *cf. Bowles v. Russell*, 551 U.S. 205, 213 (2007) (statutory deadline for filing notice of appeal is jurisdictional). Moreover, courts frequently conflated *American Pipe* and equitable tolling. See, *e.g.*, *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006) ("The *American Pipe/Crown, Cork & Seal* equitable tolling rule is a limited exception to the universal rule that statutes of limitations are impervious to equitable exceptions."); *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322-23 (2d Cir. 2004) (citing *American Pipe* for the proposition that "equitable tolling has been held appropriate where plaintiff filed and served defective papers before the expiration of the statutory period").

[36] The Court of Federal Claims did not reach this argument, deciding in favor of the U.S. on other grounds.

Contrary to the D.C. Circuit's suggestion, then, Menominee could not safely have counted on class action tolling to save its claims in 1999 through 2001 had it filed them at the administrative level but failed to appeal the agency's denial. Menominee would not have avoided its dilemma with a stamp and an envelope, but only delayed it. The Tribe would still have had to choose between individual litigation—which it did not have the resources to pursue (without depriving the tribal government of funds for services to its members)[37]—and possibly losing its claims to a (stricter) statute of limitations. This dilemma contributed to the "extraordinary circumstances" faced by the Tribe, but was all but ignored by the D.C. Circuit.

4. *Conflicting and adverse legal precedent.* The court of appeals also faulted Menominee for failing to shop around for a more favorable forum after both the Ninth and Tenth Circuits ruled against the Government's liability for unpaid contract support costs, at a time when the Tribe reasonably believed it could afford to wait for a definitive ruling from this Court.[38] The court conceded that "[o]ne can imagine circumstances in

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[37] Tribes are not permitted to use ISDA contract funds to litigate against the United States, so tribal resources must be utilized for that purpose. 25 U.S.C. § 450j-1(k)(7).

[38] The court of appeals observed that "Even after the Ninth and Tenth Circuits held against other tribes on claims like the Menominee Tribe's, the Tribe could have appealed a contracting officer's claim denial in another circuit, and had something more than 'no hope of success.'" Pet. App. 16a. Of course, other Tribes and tribal organizations were already pursuing similar claims in other circuits, including the Cherokee Nation, which ultimately prevailed in the Federal Circuit and then in this Court. *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003) aff'd & remanded, *Cherokee*, 543 U.S. 631 (2005).

which the law might be so unfavorable that it functions as an obstacle and perhaps even rises to the level of an extraordinary circumstance[,]" such as "the reversal of previously binding precedent." Pet. App. 17a.[39] But, presumably because Menominee had a choice of forum and could avoid a particular circuit's ruling, the court of appeals found that the adverse legal precedent in this case did not weigh in favor of equitable tolling and the Tribe should have filed earlier than it did. Pet. App. 17a-18a.

Again, the D.C. Circuit's strict approach would create an undesirable rule: as a protective measure, claimants should file legal claims (even weak ones) against the Government (which must then defend against those claims), as soon as possible, in the most favorable possible venue (encouraging forum shopping), regardless of the class action tolling rule. Otherwise, if class action tolling is later found not to apply (as in this case), the claimant will not be able to show an "obstacle" to filing and may be denied the protections of equitable tolling regardless of the equities. Instead of embarking on this aggressive course, however, after class certification was denied in *Cherokee Nation*

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[39] The cases cited by the Tribe were not so limited. In *Harris v. Carter*, 515 F.3d 1051, 1056 (9th Cir. 2008) cert. denied, 555 U.S. 967 (2008), the statute was equitably tolled where petitioner relied on circuit court precedent later overruled by the Supreme Court; and, in *Capital Tracing, Inc., v. United States*, 63 F.3d 859, 863 (9th Cir. 1995), the lack of clear precedent in that circuit and the absence of prejudice to the government were found to be sufficient to justify tolling. In contrast, in *Commc'ns Vending Corp. of Ariz. v. FCC*, 365 F.3d 1064, 1075 (D.C. Cir. 2004), cited by the D.C. Circuit for support, the "lack of clear precedent" found insufficient to support tolling was simply an unfavorable administrative decision, which was later overturned on appeal—a very different scenario, involving no circuit court precedent.

Menominee chose to use the time it reasonably believed it had left to diligently monitor existing litigation to see whether there was even any basis for its claims against the Government, before committing itself and the Government to further litigation. It should not be penalized for that reasonable and responsible choice, nor should the Government be permitted to unfairly profit from it.

While conflicting or adverse legal precedent is normally not enough on its own to justify equitable tolling, it is at least worthy of consideration. In this case, the conflicting and adverse precedent combined with Menominee's reasonable belief that the *Cherokee Nation* class action had tolled its claims and given the Tribe time to see whether and where the law would settle on contract support liability. Those factors, in turn, combined with Menominee's lack of financial resources, which requires the Tribe to carefully pick and choose which legal claims to pursue and which is, in fact, one of the underlying reasons why Congress requires that the Government provide contract support under the ISDA. S. REP. NO. 100-274, at 8-9 (1988). Despite this confluence of factors the Tribe was diligent in monitoring the changing legal environment, evaluating its options, and watching the clock based on the time period the Tribe believed it had to file. Considered together, and in light of the Government's decades-long attempt to skirt application of the contract support cost requirement, the circumstances were extraordinary and warrant the application of equitable tolling to avoid injustice and accord necessary relief. *Holland*, 560 U.S. at 650.

III. The D.C. Circuit wrongly refused to consider additional equitable factors relevant to an equitable tolling analysis.

The balance of equities in this case includes additional factors which the D.C. Circuit specifically declined to consider but which were considered by the Federal Circuit in *ASNA II* and weigh in favor of equitable tolling: the Government, which seeks to be excused from its liability under *Cherokee*, would not be prejudiced by the tolling of the limitations period, and stands in a special relationship with the Tribe under the ISDA which provides added justification for tolling under traditional equitable principles. See Pet. App. 12a n.4; Pet. App. 90a-91a.

A. The absence of prejudice to the Government in this case weighs in favor of equitable tolling.

Equitable tolling analysis requires inquiry into the impact on the Government of applying tolling. Specifically, "[A]bsence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply," even though it is not an independent basis for tolling. *Hedges v. United States*, 404 F.3d 744, 753 (3d Cir. 2005). See also, *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) ("absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified"); *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 863 (9th Cir. 1995) (". . . the absence of demonstrated prejudice to the government justifies equitable tolling of the limitations period[.]"). In this case, the delay allowed by equitable tolling has no prejudicial impact on the Government, a fact that weighs strongly in favor of applying the doctrine.

First, the Government has been on notice of the Tribe's claims (and those of all other tribal contractors) since at least 1999, when the Cherokee Nation filed its class action. This is a key reason why courts apply equitable tolling to defective pleading cases (which, as noted by this Court in *Irwin*, include defective class actions). *Irwin*, 498 U.S. at 96 n.3; *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429-30 (1965) ("Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy[.]"). Tolling is consistent with "essential fairness to defendants" when the class action "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 554–55. As the *ASNA II* court noted, the *Zuni* class action—like the *Cherokee Nation* class action before it—"put IHS on notice of the exact nature and scope" of the claims. Pet. App. 89a-90a.

Second, the Tribe's claims rely solely on documentary evidence—the contracts, funding agreements, indirect cost rate agreements, and shortfall reports—rather than the testimony of witnesses. Thus, the passage of time does not prejudice the Government's defense. The Federal Circuit found this to be a significant factor in its equitable tolling analysis. Pet. App. 90a.

B. Equitable tolling is supported in this case by the special government-to-government relationship between the United States and Indian tribes.

The existence of "some peculiar confidential or fiduciary relation between the parties" is a relevant factor in equitable analysis, and equity jurisdiction has

commonly been viewed as a means "to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a Court of Law." STORY § 307;[40] *id.* at § 59.

In this case, the ISDA and the Tribe's contracts specifically invoke the special government-to-government relationship between tribes and the United States. In declaring its policy of self-determination, the ISDA states that "Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole . . . ." 25 U.S.C. § 450a(b). The Tribe's contracts mirror the statutory model agreement: "The United States reaffirms its trust responsibility to the Menominee Indian Tribe of Wisconsin . . . ." J.A. 57;[41] *cf.* 25 U.S.C. § 450*l*(c).

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[40] Justice Story explained:

> In this class of cases, there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which Courts of Equity act in regard thereto, stands, independent of any such ingredients, upon a motive of general public policy; . . . [courts of equity] will, therefore, often interfere in such cases, where, but for such a peculiar relation, they would either abstain wholly from granting relief, or would grant it in a very modified and abstemious manner.

STORY § 307.

[41] This contract applied in calendar years 1996, 1997, and 1998. The successor contract had the same provision—as required by the ISDA. 25 U.S.C. § 450*l*(c).

In its report accompanying the 1988 amendments to the ISDA, the Senate Committee invoked the tribal-federal relationship and discussed it at length, noting, in part:

> The federal policy of Indian self-determination is premised upon the legal relationship between the United States and Indian tribal governments. [. . .] Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government for breach of its trust responsibility. Even more broadly, federal action toward Indians as expressed in treaties, agreements[,] statutes, executive orders, and administrative regulations is construed in light of the trust responsibility.

S. REP. NO. 100-274, at 3 (1988). Just as equity tempers rigid rules, *Holland*, 560 U.S. at 650, "the federal government's trust responsibility [to Indians] tempers all of the ordinary contract rules as applied to self-determination contracts." S. REP. NO. 100-274, at 36 (1988). As recognized by the Federal Circuit in *ASNA II*, these principles, while not dispositive, should not be ignored in determining whether tolling of the statute of limitations is called for in a given case. Pet. App. 91a. Here, the federal-tribal relationship upon which the ISDA itself is premised is a unique factor weighing in favor of equitable tolling to allow the Tribe to access the benefits intended for it under that Act.

CONCLUSION

This case involves "particular injustices" associated with the long-running contract support litigation, the type and character of which the exercise of equitable powers is intended to correct. *Holland*, 560 U.S. at 650. For decades the Government has resisted its obligation to "pay each tribe's contract support costs in full," *Salazar v. Ramah*, 132 S. Ct. at 2186, and it now asserts the statute of limitations to avoid liability. Under the extraordinary circumstances of the contract support litigation and in light of Menominee's reasonable diligence in pursuing its claims, the application of equitable tolling is warranted to allow the court to reach the merits of the Tribe's claims. Because the D.C. Circuit's refusal to extend equitable tolling in this case was based on its misapplication of *Holland* and was inconsistent with the fundamental principles of equity, the ruling below should be reversed.

Respectfully Submitted,

PAUL D. CLEMENT
BANCROFT PLLC
500 New Jersey Ave., N.W.
Seventh Floor
Washington, D.C. 20001
(202) 234-0090

GEOFFREY D. STROMMER
Counsel of Record
JERRY C. STRAUS
STEPHEN D. OSBORNE
CAROLINE P. MAYHEW
ADAM P. BAILEY
HOBBS, STRAUS, DEAN
& WALKER, LLP
806 SW Broadway
Suite 900
Portland, OR 97205
(503) 242-1745
gstrommer@hobbsstraus.com

Counsel for Petitioner

September 2, 2015